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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/712,131
Filing Date: November 13, 2003
Appellant(s): SCHABERT ET AL.

Neil F. Greenblum, Heribert F. Muensterer
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 19 October 2007 appealing from the Office
action mailed 26 March 2007.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is incorrect.

The amendment after final rejection filed on 29 May 2007 amending the claims has been entered.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: The grounds of rejections to be reviewed under part (VI) (D) is as follows:

(D) Whether claims 17, 18, 23, 24 and 28-31 are properly/improperly rejected under 35 USC 103(a) as unpatentable over DE '468 in view of DE '053 and Schulz '819, or unpatentable over Davidson in view of DE '053 and Schulz '819.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 6,279,819	Schulz	8-2001
US 4,949,845	Dixon	8-1990
US 2,038,893	Davidson	4-1936

DE 100 15 053, publication date: 9-2001

DE 44 23 468 (A1), publication date: 1-1996

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 12-14, 16, 17, 22, 25 and 26 are rejected under 35 U.S.C. 102(b) as being anticipated by Dixon. Dixon disclose a first side panel 22, 46 with a perforated zone formed by areas of flap 46 adjacent the perforations 78, a second side panel 16, lateral side panels 18, 20 connecting the first side panel to the second side panel, a

bottom closure formed by flaps 26, 30, 34, 38 or by flaps 24, 28, 32, 36, a top closure formed by the flaps opposing the bottom closure and an insertion tab 40 hinged to lateral side panel 18 and fixedly attached to the to the perforation zone in flap 46. The box is relockable by insertion of the insertion tab 40 into the box as shown in figs. 8 and 9. A two layer hanger with hanging tabs 42, 44 and apertures 86, 88 are hinged or capable of folding along the top or top area 46 of the first side panel 22, 46 (orientation with the hanger extending upwardly). The apertures 86, 88 are positioned for pressing together to form the two layer hanger. With respect to claim 13, the insertion tab is 40 is greater in width and length than a zone adjacent the perforations 78 as claimed. With respect to claim 14, the dust flaps 36, 38 are attached to the lateral side panel 18 and have rounded edges. With respect to claim 16, the hanging tabs are hinged or capable of folding relative to each other. With respect to claim 17, the first hanging tab 44 is hinged at the top of the first side panel via a cover flap 46 formed as part of the first side panel. It is noted that the area 46 is considered a part of the first side panel since it extends upwardly with the area 22 as shown in fig. 5, a cover flap since it can be inserted back into the container as part of the cover as shown in figs. 8 and 9 and is considered to include a perforation "zone" or area since it is connected along the perforations 74, 78. Dixon reads upon claims 22, 25 and 26 in the same manner as set forth above.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dixon.

Dixon discloses all structure of the claimed box except formation of the cover flap with a width 55-60 percent of the width of the top closing flap (26 or 30). It would have been obvious as a mere arbitrary change in the size of the cover flap to form the cover flap with a width 55-60 percent of the width of the top closing flap in Dixon. No functional distinction is seen nor has any functional distinction been asserted by Applicant with respect to the claimed dimension as compared dimension suggested by the prior art of record. Mere arbitrary changed in size/shape of an element have been held to be obvious for one of ordinary skill in the art. See In re Dailey, 149 USPQ 47 (CCPA 1976), Graham v. John Deere Co., 148 USPQ 459 and Gardner v. TEC Systems, Inc., 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 225 USPQ 232 (1984).

Claims 12, 16 and 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over DE '468 in view of DE '053. DE '468 discloses first and second side panels 4, 6, respectively, lateral side panels 5, 7, bottom and top closures 46, 56, 66, 76; 4a-7a, respectively, an insertion tab 9 hinged to lateral panel 7 and a perforation zone 14 formed in the side panel 4, but does not disclose a two layer hanger hinged to a top of one of the side panels. DE '053 teaches that it is known to make a side opening box with a two layer hanger (32) formed as part of the end closure flaps. It would have been obvious to make one of the end closure flaps in DE '468 with a hanger as taught by DE '053 to facilitate hanging a side opening box on a hanger for display. Note is made that

the hanger in DE '053 is formed along the major panel of the box and incorporates the full size end closure flap 52 on the opposite side of the hanger from the side wall panel 12. With respect to claim 16, the hanging tabs suggested by DE '053 are hinged or capable of folding relative to each other.

Claims 12, 13, 16, 22 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Davidson in view of DE '053. Davidson discloses first and second side panels 54, 56, opposing lateral side panels 55, 57, bottom and top closures formed by flaps 60-66, an insertion tab 58 hinged to lateral panel 57 and a perforation zone 72 within the side panel 54, but does not disclose a two layer hanger hinged to a top of one of the side panels. DE '053 teaches that it is known to make a side opening box with a two layer hanger (32) formed as part of the end closure flaps. It would have been obvious to make one of the end closure flaps attached to a side panel in Davidson with a hanger as taught by DE '053 to facilitate hanging a side opening box on a hanger for display. With respect to claim 13, the dimensions of the insertion tab 58 in Davidson are greater than an area of the portion 72 adjacent the perforations 71.

Claims 17, 18, 23 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claims 16 and 22 in paragraph 6 or 7 above, and further in view of Schulz '819. With respect to claim 17 and 23, each of modified Davidson and DE '468 evidences all structure of the claimed box except hinging of the first hanging tab to the side panel via a closure flap. Schulz '819 teaches that it is known to connect a pair of hanging tabs to a sidewall via a closure flap (311) to facilitate disposition of the hanger centrally of the end closure. It would have been

obvious to connect the hanging tabs in modified Davidson or DE '468 to the side panel via a closure flap as taught by Schulz '819 to provide more even weight distribution when hanging box. With respect to claim 18 and 24, each of modified Davidson and DE '468 further does not evidence formation of the cover flap with a width of 55-60 percent of the width of the top closing flap. It would have been obvious as a mere arbitrary change in the size of the cover flap to form the cover flap with a width 55-60 percent of the width of the top closing flap in either modified Davidson or DE '468. No functional distinction is seen nor has any functional distinction been asserted by Applicant with respect to the claimed dimension as compared dimension suggested by the prior art of record. Mere arbitrary changed in size/shape of an element have been held to be obvious for one of ordinary skill in the art. See In re Dailey, 149 USPQ 47 (CCPA 1976), Graham v. John Deere Co., 148 USPQ 459 and Gardner v. TEC Systems, Inc., 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 225 USPQ 232 (1984).

Claims 28-31 are rejected under 35 U.S.C. 103(a) as being unpatentable over the prior art as applied to claims 17 and 23 in either paragraph 8 above, and further in view of Schulz '819. Each of modified Davidson and DE '468 evidence all structure of the claimed blank except attachment of the hanger to the second side panel. Schulz '819 further teaches that it is known to secure a hanger to the second side panel. It would have been obvious to reverse the position of the hanger in modified Davidson or DE '468 as taught by Schulz '819 as a mere reversal of parts. No distinction is seen between securing the hanger to the first side panel and the second side panel. The difference is considered arbitrary and suggested by the prior art. With respect to claim

30, it would have been obvious as a mere arbitrary change in the size of the cover flap to form the cover flap with a width 55-60 percent of the width of the top closing flap in modified Davidson or DE '468. No functional distinction is seen nor has any functional distinction been asserted by Applicant with respect to the claimed dimension as compared dimension suggested by the prior art of record. Mere arbitrary changed in size/shape of an element have been held to be obvious for one of ordinary skill in the art. See In re Dailey, 149 USPQ 47 (CCPA 1976), Graham v. John Deere Co., 148 USPQ 459 and Gardner v. TEC Systems, Inc., 220 USPQ 777 (Fed. Cir. 1984), cert. denied, 225 USPQ 232 (1984).

(10) Response to Argument

The arguments in the Brief with respect to Dixon assert that (1) panels 18 and 20 cannot be lateral side panels since Dixon sets forth that panel 20 is a bottom panel and panel 18 is a top panel, (2) the hanger is not hinged to the top of the first side panel because the hanger is hinged to the bottom of the perforated zone, (3) with respect to claim 17, panel 46 cannot be both a cover flap and a perforated zone and (4) the remarks assert that panel 22 as opposed to portions 22 and 46 as set forth in the final rejection constitute a first side panel.

In response, whether Dixon orients the panels 18 and 20 at the top or bottom does not define the box claimed over the box disclosed in Dixon. The intended orientation of the box with respect to top and bottom does not change the structure of the box. The box disclosed in Dixon is capable of being oriented with the end closure flaps formed at the top and bottom or with the hanger at the top or bottom. The box is

of the same construction irregardless of the orientation. With respect to claim 17, the panel 46 is considered to include a perforation zone adjacent the perforations. The claims do not delineate what bounds the area being claimed. The zone could be any size so long as it involves the perforations. The panel 46 is considered a portion of the first side panel since it extends upwardly in continuation of the panel 22, a cover flap since it is inserted into the container as part of the cover after initial opening and is considered to include a zone or area adjacent the perforations. Nothing within the claims precludes such an interpretation.

The arguments with respect to the other rejections stress the orientation of the box relative to top and bottom as well as the top and bottom orientations expressly set forth in the respective references. In response, no distinction is seen between the boxes of Davidson or DE '468 and that claimed as a result of the intended orientation of the panels as top and bottom. The boxes are clearly capable of being oriented with the end closure flaps incorporating the hanger panels extending upwardly. The remarks also assert that there is no rationale set forth in the applied prior art references to modify Davidson or DE '468 to include hanger panels as part of the end closure flaps. In response, it is believed that one of ordinary skill in this art would have recognized the advantages of having hanger panels as part of the end closure flaps in a tear open carton opened along the side and lateral panels upon viewing DE '503. An explicit recitation of such advantages by the applicant in DE '503 is not required.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.


Respectfully submitted,



Gary Elkins

Primary Examiner, Art Unit 3782

Conferees:



Nathan Newhouse, Anthony Stashick